Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1606

MYRA EMILY STEIN GOUGER and
DONALD THOMAS GOUGER,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
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The Petitioners, MYRA EMILY STEIN GOUGER and DONALD THOMAS GOUGER, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals has not yet been reported. It is set out in the Appendix, infra, pg. 41.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1979. Petition for Rehearing was denied

on March 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

QUESTION ONE

Whether the Fifth Amendment rights of these Petitioners were violated when the prosecutor for the United States of America argued, at the guilt-innocence stage of the trial, "I think one of the most notable things about Mr. Martin's argument is his complete failure to tell us why the Gougers did not, like reasonable honest citizens should do, respond to that phone call a year before." ". . . There was nothing about why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was a arrest warrant out for Mrs. Gouger and please come down to the Federal Building and resolve it." "Nothing."?

QUESTION TWO

Whether the learned trial court judge committed reversible error by failing to instruct the jury in this cause, wherein the Petitioners were charged with making assaults upon members of the United States Marshal's Service, that if, looking at the events from the position or standpoint of the Petitioners, the Petitioners either believed or had a reasonable doubt that the alleged complainants were not engaged in the performance of their official duties, then the jury should find the Petitioners not guilty of the alleged offenses.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury * * * ; nor shall any person * * * be deprived of life, liberty, or property, without due process of law. * * *."

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * *."

STATUTORY PROVISIONS INVOLVED

1. Title 18, United States Code, Section 111, provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

2. Title 18, United States Code, Section 1114, provides:

> "Whoever kills any judge of the United States, any United States Attorney, any Assistant United States

Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Invesigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Drug Enforcement Administration, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer

or employee of the Department of Health, Education, and Welfare, the Consumer Product Safety Commission, or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title."

STATEMENT

The Petitioners, MYRA EMILY STEIN GOUGER and DONALD THOMAS GOUGER, were each convicted of violating Title 18, United States Code, Section 111, in that each allegedly "assaulted, resisted, opposed, impeded, or interfered" with one Linda Kalmbach and one Ray M. Brite, United States Marshals, who were then and there allegedly engaged in the performance of their duties. To the accusation, the Petitioners pled not guilty. Petitioners were appointed trial counsel but they subsequently paid that Counsel for his representation. On May 23, 1978, the Petitioners were found guilty and, on August 2, 1978, each Petitioner was sentenced to three (3) years imprisonment.

SUMMARY OF THE FACTS OF THE CASE

The events leading to the arrests and convictions of these Petitioners arose from an earlier dispute with the Internal Revenue Service concerning certain tax records. This dispute was not in the nature of "the tax protesters movement" but was merely a disagreement over how the matter, concerning the return of the Petitioners' tax records, would be handled. The Petitioner, Donald Thomas Gouger, is a medical doctor who has not prac-

ticed medicine in several years; desiring instead to pursue another vocation rather than the practice of medicine.

The history of this dispute with the Internal Revenue Service had been long. This history, as reflected by the official file and docket sheet in the District Clerk's office, (Civil File No. 75-H-61), is, in part, as follows:

1. On August 14, 1975, the United States filed a petition to enforce an Internal Revenue Service Summons against MYRA EMILY STEIN GOUGER. On November 26, 1975, Judge Singleton issued an order to show cause, ordering MYRA EMILY STEIN GOUGER to appear in his courtroom on December 15, 1975, at 9:30 a.m.

2. On January 29, 1976, Judge Singleton issued a new show cause order, ordering MYRA EMILY STEIN GOUGER to appear in his Court on February 23, 1976.

3. On February 24, 1976, Judge Singleton issued a new show cause order, ordering MYRA EMILY STEIN GOUGER to appear in his Court on March 16, 1976. On February 25, 1976, this order was served on MYRA EMILY STEIN GOUGER. The docket sheet does not have an entry for March 16, 1976, however, on March 31, 1976, the Court held a hearing. DONALD THOMAS GOUGER, not the respondent MYRA EMILY STEIN GOUGER, was present. The Court orally ordered compliance with the summons by April 12, 1976. On April 5, 1976, Judge Singleton issued a written order for MYRA EMILY STEIN GOUGER to comply with the summons on April 12, 1976, at 10:00 a.m.

4. On October 12, 1976, the Government filed another motion for order to show cause since MYRA EMILY STEIN GOUGER did not appear on April 12, 1976. On October 12, 1976, Judge Singleton issued a show cause order, ordering MYRA EMILY STEIN GOUGER to appear in his Court on November 1, 1976.

5. On November 9, 1976, Judge Singleton issued a new show cause order, ordering MYRA EMILY STEIN GOUGER to appear in his Court on November 29, 1976. On November 11, 1976, this order was served on MYRA EMILY STEIN GOUGER.

6. On November 29, 1976, MYRA EMILY STEIN GOUGER did not appear. On December 9, 1976, Judge Singleton issued a Writ of Attachment on MYRA EMILY STEIN GOUGER for her failure to appear on November 29, 1976. On December 10, MYRA EMILY STEIN GOUGER was arrested on said writ by Deputy United States Marshal Linda Kalmbach and another Deputy United States Marshal.

7. On December 13, 1976, MYRA EMILY STEIN GOUGER appeared before Judge Singleton and was orally ordered to produce records to the Internal Revenue Service by 5:00 p.m. on January 10, 1977. This order was reduced to writing and filed January 5, 1977.

8. On January 24, 1977, the Government filed another motion for a show cause order on the grounds that MYRA EMILY STEIN GOUGER did not appear on January 10, 1977. On January

25, 1977, Judge Singleton issued a new show cause order, ordering MYRA EMILY STEIN GOUGER to appear in his Court on February 10, 1977.

9. On February 10, 1977, Judge Singleton issued a Writ of Attachment for MYRA EMILY STEIN GOUGER for failing to appear on January 10, 1977, as ordered. (See No. 7, above). On January 3, 1978, MYRA EMILY STEIN GOUGER was arrested on said writ by Deputy United States Marshal Linda Kalmbach and other Deputy United States Marshals.

10. On January 5, 1978, MYRA EMILY STEIN GOUGER appeared before Judge Singleton and was told by Judge Singleton that she would be tried for contempt on January 12, 1978.

11. On January 12, 1978, in open Court before Judge Singleton, the Court granted the Government's oral motion to dismiss the contempt charges.

It was during the execution of the writ (see No. 9, above) that the alleged criminal assaults occurred.

Additionally, on June 7, 1977, the Petitioners received a letter from the Internal Revenue Service notifying them that: "You will be pleased to know that our examination of your tax returns for the above periods [1970, 1971, 1972] shows no change is required in the tax reported." "Your returns are accepted as filed." This letter was signed by the District Director of the Internal Revenue Service, Mr. Robert M. McKrever.

Further, on January 3, 1978, an Assistant United States Attorney, Mr. Parker, called the Marshal's Office and inquired about the status of the Writ. Without further ado, certain members of the Marshal's Office, together with local law enforcement officials, then re-enacted "D-Day" at the home of the Petitioners. The Petitioners, having previously received the letter from the Internal Revenue Service, thought the matter was over. The members of the Marshal's Service, seeing that the Writ was still unexecuted, did not believe the matter was over and successfully executed the Writ this time although, though requested, they refused to show the Writ to the Petitioners at that time.

Neither of the Petitioners testified or offered evidence in this Cause on advice of their then attorney.

REASONS FOR GRANTING THE WRIT

QUESTION ONE (Restated)

Whether the Fifth Amendment rights of these Petitioners were violated when the prosecutor for the United States of America argued, at the guilt-innocence stage of the trial, "I think one of the most notable things about Mr. Martin's argument is his complete failure to tell us why the Gougers did not, like reasonable honest citizens should do, respond to that phone call a year before." ". . . There was nothing about why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was a arrest warrant out for Mrs. Gouger and please come down to the Federal Building and resolve it." "Nothing."?

After both sides rested their respective causes, and during jury argument, the prosecutor for the Government argued, in part, the following:

> I think one of the most notable things about Mr. Martin's argument is his complete failure to tell us why the Gougers did not, like reasonable, honest citizens should do, respond to that phone call a year before.
>
> All of this happened—
>
> Mr. Martin: This is outside of this lawsuit. There is no duty for these people to respond.
>
> Mr. O'Donnell: I am talking about Mr. Martin's argument, Your Honor.
>
> The Court: You may proceed.
>
> Mr. O'Donnell: I am talking about Mr. Martin's argument. There was nothing about why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was a arrest warrant out for Mrs. Gouger and please come down to the Federal Building and resolve it. Nothing.
>
> If you find her, you can have her.
>
> Now, is that the kind of, type of people that the law abiding, that want to have respect for law enforcement officers?
>
> Do you think that is the type of people who respect the law enforcement officers.
>
> If you find her, you can have her.

What construction can be placed upon the English language other than the implication that the language used had reference to these accused persons?

It is axiomatic the Constitutional law of this Land holds that a prosecutor cannot comment on a defendant's failure to testify and a comment on an accused's failure to testify presents a Federal Constitutional question as same, when made, is violative of the self-incrimination clauses of the Fifth Amendment to the Constitution.

In *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 rehearing denied 381 U.S. 957, 85 S.Ct. 1797 (1975), a majority of this Honorable Court, by a 6-2 decision, majority opinion by Mr. Justice Douglas, held that the Fifth Amendment forbids either comment by the prosecutor on the accused's silence or instructions by the court that such silence is evidence of guilt.

Subsequently, this Court held that such error could be harmless error. See *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In *Chapman,* it was held, however, that the facts presented there did not present harmless error and that such comments as made there might have contributed to the conviction. The Court thus reversed. See also *Fontaine v. California,* 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968).

This was not invited argument here. It was a comment on the Petitioners' failure to testify. Who, but the Petitioners, could have "told us why the Gougers did not, like reasonable, honest citizens should do, respond to that call a year before?" Who, but the Petitioners, could have told the jury "why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was an arrest warrant out for Mrs. Gouger and please come down to the Federal building and resolve it." "Nothing." "If you find her, you can have her." "Now, is that the

kind of, type of people that the law abiding, that want to have respect for law enforcement officers?" "Do you think that is the type of people who respect the law enforcement officers." "If you find her, you can have her."

The attempt, in the guise of saying it referred to Trial Counsel's jury argument, to comment on the Petitioner's failure to testify, though ingenious and extremely clever still does not detract from the fact that this argument was a comment on the Petitioners' failure to testify.

The defense counsel's opening argument, See p. 207, was perfectly properly argument, See p. 228. "We all want to have faith in our law enforcement agencies." I do, so do the Gougers." This, under or by any stretch of the imagination could not be deemed invited argument to the argument of the prosecutor.

In reference to the phone call "a year before," the Record reflects that "on or about February 14, 1977," Kalmbach and a Deputy Lawrence called the residence number of what was purportedly the Gouger's and a person, who identified himself as Mr. Gouger, answered the telephone. They informed the person of the outstanding Writ for Mrs. Gouger and were informed that she was out of the city. "She had a death in the family and that she was gone." Whether done in a serious or joking vein is not shown, but the person said: "If you can find her, you can have her." Whether this communication, except by the prosecutor's jury argument, was ever relayed to Mrs. Gouger is not shown by this Record on Appeal. On January 3, 1978, Kalmbach and the others decided to go to the residence of the Gouger's. They first made a telephone call and a person, who identified himself as a Mr. Stein, whose voice was shown

to be Dr. Gouger's, answered the telephone. The person arranged an appointment for the purpose of selling some dinnerware to Kalmbach. Even though Kalmbach had talked to someone at the same telephone number a year before she could not recognize Dr. Gouger's voice. (61).

Here, by the trial court's ruling, "You May Proceed," apparently, the trial court judge was under the mistaken impression that if the Government's Counsel did not specifically refer to the Petitioners, then it was permissible to comment on their failure to testify. Nothing, of course, could be farther from the law. The argument, of course, was aggravated by the prosecutor implying that the Petitioners were not honest citizens nor law abiding citizens and his argument further implied they had a bad reputation toward law enforcement officers in general.

These comments were improper and they may have affected the substantial rights of these Petitioners.

This case is unlike *Lockett v. Ohio,* 438 U.S. ____, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), where the Court rejected this type contention because "When viewed against this background [of the case], it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Locket would take the stand."

This Honorable Court, in *Anderson v. Nelson,* 390 U.S. 523, 20 L.Ed.2d 81, 88 S.Ct. 1133 (1968), in a per curiam opinion, reaffirmed the rule of law that "comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment

is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal." This, too, is one of those cases.

This case resembles *Fontaine v. California,* 390 U.S. 593, 20 L.Ed.2d 154, 88 S.Ct. 1229 (1968), where this Honorable Court, by another per curiam opinion, granted relief. The prosecutor argued in part: "How do we know the defendant knew it was marijuana?" "Well, I guess if he didn't know it was marijuana he could have taken the stand and told us that he didn't know it was marijuana and thereby subject himself to cross-examination, if he chose not to."

> "These comments upon petitioner's failure to take the stand violated his constitutional privilege against self-incrimination." (20 L.Ed.2d 157).

Is the argument: "I think one of the most notable things about Mr. Martin's argument is his complete failure to tell us why the Gougers did not, like reasonable, honest citizens do, respond to that phone call a year before." ". . . There was nothing about why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was a arrest warrant out for Mrs. Gouger and please come down to the Federal Building and resolve it." "Nothing." any worse a comment upon the Petitioners' failure to take the stand?

This was not harmless error in light of the facts of the case.

QUESTION TWO (Restated)

Whether the learned trial court judge committed reversible error by failing to instruct the jury in this cause, wherein the Petitioners were charged with making assaults upon members of the United States Marshal's Service, that if, looking at the events from the position or standpoint of the Petitioners, the Petitioners either believed or had a reasonable doubt that the alleged complainants were not engaged in the performance of their official duties, then the jury should find the Petitioners not guilty of the alleged offenses.

Unless a strict liability interpretation is placed upon the statute at Bar, if a defendant makes an honest mistake of fact with respect to the officer's status and his use of force would have been justified against a private citizen, then he cannot be held liable under Section 111. "For to hold him liable would create a situation 'where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected.' " See *United States v. Hillsman,* 522 F.2d 454 (7th Cir. 1975).

Under the facts of this cause, the error alleged was plain error going to the very basis of the Petitioners' guilt or innocence.

DISCUSSION, ARGUMENT AND AUTHORITIES

The Supreme Court, in *United States v. Feola,* 420 U.S. 671, 43 L.Ed.2d 541, 95 S.Ct. 1255 (1975), speaking through Mr. Justice Blackmun, ruled that for the purpose of individual guilt or innocence, awareness of the official identity of the assault victim is irrelevant to a Section 111 offense. Thus, an assailant need not

know nor have reason to know that the person he assaults is a Federal official in order to be found guilty.

However, the Majority of the Court did not make the statute an absolute liability statute or a strict liability statute thereby prohibiting the accused person from claiming any defense for, as Mr. Justince Blackmun said:

> We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under § 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.
>
> We hold, therefore, that in order to incur criminal liability under § 111 an actor must entertain merely the criminal intent to do the acts therein specified.

Here, the Government filed a *Motion in Limine*, See Vol. I, p. 9, which stated, in part: "The purpose of this motion in limine is to preclude the jury in the trial of this case from hearing any evidence that the Writ was subsequently dismissed and to preclude the jury from hearing any evidence purporting to show that the defendant, MYRA EMILY STEIN GOUGER, *did* obey the Court's order of January 5, 1977." The long and short of the Government's motion was that this made

the statute a strict liability statute and there was nothing the Appellants could do or say to prevent them from being convicted. Trial Counsel for the Appellants, in his reply, see p. 115, pointed out that it was not the intention of the Appellants to use exculpatory evidence to show they had the right to forcibly resist the execution of the writ of attachment merely because it was subsequently dismissed.

> However, these Defendants will contend at trial that they did not know the persons entering their house were Deputy United States Marshals. *These Defendants will contend that the matter leading up to the issuance of the Writ had been concluded and in their belief, dismissed.* The fact that the Writ was subsequently dismissed on the motion of the Government supports the Defendant's belief on the date of the Indictment. (Emphasis Italicized).

The Government's Motion in Limine was granted. (See Vol. I, p. 125).

With this, for all practical purposes, in light of the trial court's subsequent charge, (See Vol. 3, Commencing with page 249), the case ended at that point in time as the Appellants were stripped of any defense they may have had to the accusation brought against them. The trial became a mere legal formality to find the Appellants each guilty of the alleged offenses.

However, the trial court judge stated: "It's up to the jury to decide whether or not the Gougers were acting wilfully in resisting arrest." (Vol. 3, p. 7). But, no defensive charge was forthcoming nor was the jury so instructed. In this, it is respectfully submitted, the trial court judge reversibly erred by failing to charge the jury

that the Appellants had the defense of self defense to the accusations.

The facts here are rather simple.

By the Records of the Court below, it appears that the Appellants were being audited by the Internal Revenue Service. This commenced in October, 1975, and, by the Records, many orders were entered by Hon. John Singleton, some of which were erroneously dated, necessitating the issuing of new orders. Finally, an Order issued on January 5, 1977, ordering the Appellant, *Myra Emily Stein Gouger,* to report to an Internal Revenue Service Office on January 10, 1977, before 5:00 O'Clock P.M., with the proviso that if she did not do so she was in contempt of Court and fined $10,000.00. However, on February 10, 1977, a Writ of Attachment for Contempt was issued for the body of Mrs. Gouger, to show cause why she should not be held in contempt of court even though she had already been held in contempt of Court contingent if she did not report to the said Internal Revenue Service Office. An attempt to contact Mrs. Gouger, by telephone, on February 14, 1977, by Marshals Lawrence and Kalmach was made. They were informed that Mrs. Gouger was out of the city, but "if you can find her, you can have her."

However, thereafter, the District Director, Internal Revenue Service, wrote the Gouger's on June 7, 1977, that "You will be pleased to know that our examination of your tax returns for the above periods, [1970, 1971, 1972], shows no change is required in the tax reported." "Your returns are accepted as filed." "Thank you for your cooperation."

The matter languished from early 1977 until January 3, 1978, almost a year later, when an Assistant United States Attorney, Richard Parker, "made inquiry of the United States Marshal's Office as to the status of case No. 75-H-61—Civil Action, United States of America and A. M. Morton, Internal Revenue Service Officer v. Myra Emily Stein Gouger, issued by Judge John Singleton, United States District Judge, for Southern District of Texas."

UNITED STATES GOVERNMENT MEMORANDUM

Date:
January 3, 1978 (Date of Occurance)
March 13, 1978 (Date of report typed)

Reply to Attn of:
Linda Kalmbach
Deputy United States Marshal S/D Texas—Houston

Subject:
Arrest of Myra Gouger, Case No. 75-H-61

To:
T. R. Coney
United States Marshal
Southern District of Texas—Houtson

On January 3, 1978, Assistant United States Atty, Richard Parker, made inquiry of the United States Marshal's Office as to the status of case No. 75-H-61 —Civil Action, *United States of America and A. M. Morton, Internal Revenue Service Officer v. Myra Emily Stein Gouger,* issued by Judge John Singleton, United States District Judge, for the Southern District of Texas.

Inquiry of subject case was referred to me by Supervisor Deputy Henry E. Baker, and told to check and

see if any information was available. It had been the many attempts of this office in locating Myra Gouger, that lead to the decision of Deputy Baker and myself, that I attempt to purchase some dinnerware from Saladmaster in trying to find Myra Gouger.

In checking the file, I found that Mr. Trayhan, Saladmaster Sales & Service, Houston, Texas, had been helpful on previous occasions in the location, or attempted location of Myra Gouger. Contact was attempted at 479-7270 with no response.

Attempt was made to contact Mr. Edwardson, District Manager for Saladmaster Sales & Service, and a message was left to return my call.

Attempt was made to contact Myra Emily Stein Gouger at 641-2421, number showed to be listing for Fogg Construction Company.

Attempt was made to contact Myra Emily Stein Gouger at 688-4343, a recording device answered the phone advising that this number was a listing for Saladmaster Dealership, 368 N. Post Oak Lane, and MasterGuard Inc., and to leave a message at the sound of the tone or call 784-9612.

Attempt was made to contact Myra Emily Stein Gouger at 784-9612, a man's voice answered the phone, and I inquired if I had reached 784-9612, and the male voice confirmed that it was. I advised that I was referred to that number by a recording when I called 688-4343 to seek information about Saladmaster Dinnerware, and again the male voice confirmed that I had reached the correct number, I asked to whom I was speaking and the person identified himself as "Mr. Stein".

I told Mr. Stein that I was interested in purchasing some dinnerware for a friend, and wanted to see some of the different samples that Saladmaster had

to offer. Mr. Stein advised that one of his better sales personnel was at her office and would be there for several hours due to the fact that she was having her car inspected, and was without transportation, Mr. Stein suggested that I stop at her office to look at the dinnerware I was interested in. I asked where such office was located and he advised that Myra worked at No. 6 Memorial Point, and gave directtions of traveling Memorial Drive west to Blalock Drive, and that Memorial Point would be just beyond Blalock Dr. Mr. Stein inquired as to what type car I would be driving, and I asked the reason for such inquiry, and he advised that several attempted break-ins have taken place in the last couple of months. I asked Mr. Stein if Myra lived at No. 6 Memorial Point, and he was very hesitant about answering. I told Mr. Stein that I would be driving a yellow Mustang. Mr. Stein inquired as to my name, I gave the name of Betty Smith, and he wanted to know who I was employed by, and I told him that I was employed by Pennyrich Bra Company.

Mr. Stein left no indication that Myra was nothing more than a sales person for his company, or that Myra lived at No. 6 Memorial Point—but only used it as her office for Saladmaster.

Using disguises and a false front, several Marshals of the Houston District, together with authorities from a municipality located in Harris County, Texas, prepared their "Commando raid" on the home of the Gouger's located at 6 Memorial Point.

Marshals Kalmbach and Hayes went to the home, rang a doorbell, when Dr. Gouger came out and told them they were to come to the backdoor. After Dr. Gouger opened the garage door, by an electronic device, Kalmbach and Hayes then went inside the garage area, with

Dr. Gouger directing them into the kitchen area of the home. Everyone then went into the kitchen when Mrs. Gouger appeared. At this time, Kalmbach "walked up to Mrs. Gouger and told her that I was Linda Kalmbach, that I was with the United States Marshal's office, and that I had a warrant for her arrest." The Gouger's ordered Kalmbach and Hayes to leave their home. "Mr. Gouger informed us we had no right to take her." Mrs. Gouger informed them they had no right to be there as "the matter had been completely cleared up, and I have a letter to prove it." Mr. Gouger then went and got the letter from the Internal Revenue Service, See supra, gave it to Mrs. Gouger, who in turn gave it to Kalmbach. "I told Mrs. Gouger that it didn't make any difference what kind of letter she had." "I had a court order." "I was there on official duty." "I had to take her with me back to the court." At this time, Kalmbach attacked and assaulted Mrs. Gouger. "I grabbed her by the elbow to pull her back in the area where I was at."

During this period of time, the "back-up squad" appeared on the scene, with efforts then made to subdue, by force and violence, Mrs. Gouger, with the parties then wrestling on the floor. Dr. Gouger then attempted to pull Bursby off the floor as he was on or near the top of Mrs. Gouger. Dr. Gouger was then handcuffed by Schulte, a village police officer, and Brite. Mrs. Gouger was also handcuffed but the handcuffs were not locked in order that when one moved this caused them to tighten on the person's wrist causing physical pain.

At no time was the writ of attachment shown to the Gouger's. (Vol. 3, p. 76).

Q: Now, did they ever ask you to look at the writ?
A: Yes, they did.
Q: When did they do that?
A: When Mrs. Gouger found out who I was, she wanted to see the writ.
Q: What did you say?
A: I told her she could see it when we got to the Federal building.
Q: Why didn't you show it to her right then?
A: It is customary.
Q: Tell us why?
A: It is not necessary to show the writ.

* * *

Q: Just tell us why you didn't bring it out, the writ, when they asked to look at it.
A: Usually the arresting officers presents the writ to the party they are arresting at the time most convenient to the arresting officer. I did not feel it very convenient at this particular moment, no sir.
Q: Why was that?
A: With the many events that were taking place. (Vol. 3, pp. 88-89).

Kalmbach also testified that she did not receive any medical treatment, did not suffer any bodily injury, nor did she suffer any physical pain. (92) She was kicked "when Deputy Bursby and Deputy Hayes and Mrs. Gouger and I were all on the floor."

Hayes testified this was her first day on the job. (98). She testified that Dr. Gouger, when he asnwered the door, asked "what we wanted and who we were." Kalmbach told him "we had called earlier and made an appointment to see Mrs. Gouger." (100). When they got in the kitchen, and when Mrs. Gouger appeared, Kalmbach

"had on a hat and some glasses, she took off her hat and sunglasses and said, "Mrs. Gouger, I am Linda Kalmbach." "I am a deputy . . . United States Marshal." "And I am here to place you under arrest." (102). It was at this time that Dr. Gouger then informed them of the letter they had received from the Internal Revenue Service which, as noted, made no difference to Kalmbach. When Hayes tried to open the front door, Dr. Gouger attempted, without success, to prevent this from occurring. However, Schulte entered, with Brite and Bursby behind him.

Hayes also admitted that, until she and Dr. Gouger were at the front door, she showed no identification of any kind.

Brite testified that Dr. Gouger "was telling us to get out of the house. we had no business there." "He was telling his wife to quiet down." "He was telling the deputies to get their hands off of his wife, get out of the house, it's my house, words to that effect." (136). Brite was one of the back-up persons and because he and the other backup persons did not hear from Kalmbach and Hayes via their walkie-talkie, which did not function on this occasion, he and Bursby then went to the driveway of the home. When the garage door would not open, they then went to the front door. See, supra, Hayes' testimony. When Brite got inside he saw that Kalmbach was struggling with Mrs. Gouger and he started toward them to help them subdue Mrs. Gouger. Dr. Gouger then tried to pull Brite backwards to get him off his wife. A struggle resulted; consummated in Schulte and Brite handcuffing Dr. Gouger. Brite sustained bruises but received no medical treatment of any kind.

Bursby also testified but his testimony was cumulative to the others. Schulte also testified but his testimony also was cumulative to the others except he testified that, regarding the front door matter, see supra, Dr. Gouger was trying to get or push Hayes *out* the front door. Dr. Gouger told Schulte that "they got in my house under false pretenses and I want them out of here."

The above are the salient facts of this case. The Court's charge, in part, reflects the following:

> * * * evidence of a defendant's guilt. It is merely the formal manner by which the Government accuses a person of a crime in order to bring the defendants to trial.
>
> The jury must not be prejudiced against a defendant because an indictment has been returned against him or her.
>
> The defendants are not on trial for any act or conduct not alleged in the indictment.
>
> It is charged in Count One of the Indictment that on or about January 3, 1978, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, Myra Emily Stein Gouger, did willfully and forcibly assault, resist, oppose, impede and interfere with Linda Kalmbach, a Deputy United States Marshal of the Justice Department, while the said Linda Kalmbach was engaged in the performance of her official duties, in violation of Title 18, United States Code, Section 111.
>
> In Count Two.
>
> It is charged in the Indictment that on or about January 3, 1978, in the Houston Division of the Southern District of Texas and within the jurisdiction

of this Court, Donald Thomas Gouger, did willfully and forcibly assault, resist, oppose, impede, and interfere with Ray M. Brite, a Deputy United States Marshal of the Justice Department, while the said Ray M. Brite was engaged in the performance of his official duties, in violation of Title 18, United States Code, Section 111.

You will note that the Indictment charges that the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Section 111 of Title 18 of U.S.C. provides in part that:

> "Whoever forcibly assaults, resists, opposes, impedes, . . ., or interferes with any person designated in Section 1114 of this Title while engaged in or on account of the performance of his official duties,"

Shall be guilty of an offense against the laws of the United States.

You are further instructed that deputy United States Marshals are so designated in Section 1114 of Title 18 of the United States Code.

The essential elements of the charge against the defendant, Myra Emily Stein Gouger, in Count One of the Indictment are:

1. That defendant Myra Emily Stein Gouger, forcibly assaulted, resisted, opposed, impeded, and interfered with Linda Kalmbach, a Deputy United States Marshal.

2. That such acts, if any, were committed willfully; and

3. That the said Linda Kalmbach was engaged in the performance of her official duties at the time in question.

The Government does not have the burden of proving beyond a reasonable doubt that the defendant willfully and forcibly did each and every one of the acts alleged, that is, assault, resist, oppose, impede, and interfere. The Government must prove beyond a reasonable doubt that the defendant willfully, forcibly did one of those acts and during the commission of such act or acts the Deputy United States Marshal was engaged in the performance of her official duties.

The Government does not have to prove that the defendant knew that Linda Kalmbach was a Deputy United States Marshal.

The essential elements of the charge against the defendant, Donald Thomas Gouger, in Count Two of the Indictment are:

1. That defendant, Donald Thomas Gouger, forcibly assaulted, resisted, opposed, impeded, and interfered with Ray M. Brite, a Deputy United States Marshal;

2. That such acts, if any, were committed willfully; and

3. That the said Ray M. Brite was engaged in the performance of his official duties at the time in question.

The Government does not have the burden of proving beyond a reasonable doubt that the defendant willfully and forcibly did each and every one of the acts alleged, that is, assault, resists, oppose, impede and interfere. The Government must prove beyond a reasonable doubt that the defendant willfully, forcibly did one of those acts and during the

commisison of such act or acts the Deputy United States Marshal was engaged in the performance of his official duties.

The Government does not have to prove that the defendant knew that Ray M. Brite was a Deputy United States Marshal.

I will now define for you some of the words used in the Indictment, the Statutes, or both, which have not been defined heretofore.

An act is done "willfully" if done voluntarily and purposely, and with the specific intent to do that which the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law.

The word "forcibly," as used in the Indictment and in this charge, means simply the use on the part of the defendants of force upon or toward the restrictive Deputy United States Marshal, as charged in the Indictment.

The word "assault," as used in the indictment and in this charge, means any willful threat or attempt to commit injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display or force such as would give the victim reason to fear or expect immediate bodily harm.

An assault may be committed without actually touching, striking, or doing bodily harm to the person of another. It is not necessary that the person assaulted believe that any bodily injury he might sustain would be great or severe.

For instance, the mere attempt to strike a person with an open hand might constitute an assault, although that person knows that a blow by the open hand is not normally calculated to cause any serious harm.

The word "resist," as used in this charge, means to prevent a certain act; to exert oneself to counteract, defeat, frustrate or to repel.

The word "oppose," as used in this charge, means to put in opposition; to resist by physical means or by arguments; to contend against or withstand a matter.

The word "impede" means to interfere with or slow the progress of; to hinder.

The word "interfere," as used in in this charge, means to enter into or take a part in the concerns of others; to meddle in a matter; to interpose in a way that hinders or impedes.

To constitute the crime charged in the Indictment there must be the joint operation of two essential elements, an act forbidden by the law and an intent to do the act.

Before a defendant may be found guilty of a crime, the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions the defendants were forbidden to do the act charged in the Indictment, and that the defendants knowingly and intentionally committed the acts.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind.

But you may infer a defendant's intent from the surrounding circumstances. You may consider any statement made and acts done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

The specific intent of those accused by the Government must be proved beyond a reasonable doubt before there can be conviction.

Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that the defendants willfully and knowingly did an act which the law forbids, or willfully and knowingly failed to do an act which the law requires, purposely intending to violate the law.

Such intent may be determined from all the facts and circumstances surrounding the case.

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means.

While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course, there can be no eyewitness account of the state of mind with which the acts were done or omitted.

But what the defendant does, or fails to do, may indicate intent, or lack of intent to commit the offense charged.

As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted.

So, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Intent and motive should never be confused. Motive is what prompts a person to act or fail to

act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime.

So, the motive of the accused is immaterial except insofar as evidence of any motive may aid determination of the state of mind or intent.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

A separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find all or some of the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against any of the defendants.

It is your duty to give separate, personal consideration to the case of each individual defendant.

When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendand or defendants.

Here, the issue was whether the Appellants each assaulted a Federal official, two United States Marshals. The facts, as to any defense, are quite simple:

1. A Writ of Attachment issued for the arrest of the Appellant Myra Emily Stein Gouger on February 10, 1977.
2. A meagre attempt to serve this writ was made in that a telephone call was made to the Appellant's residence with the Appellant, Dr. Gouger, advising the calling party that the Appellant, Mrs. Gouger, was out of town.
3. The matter apparently lay dormant until January 3, 1978.
4. In the intervening period of time, in June, 1977, the Internal Revenue Service had given the Gouger's a "clean bill of health" regarding their income tax returns.
5. On January 3, 1978, by use of a false pretext, complete with disguises, an attempt was made to execute the writ of attachment by gaining entry into the home of the Gouger's.
6. Once Mrs. Gouger made her appearance, it was then announced that the pretenders were actually United States Marshals and not ladies of the evening attempting to buy merchandise from the Gougers.
7. When Mrs. Gouger found out who Kalmbach was, she asked to see the Writ of Attachment but it was not shown to her because Kalmbach "did not feel it very convenient at that particular moment" to produce it and Kalmbach told Mrs. Gouger "she could see the Writ when we got to the Federal building."

8. When efforts were made to apprehend Mrs. Gouger, with the ensuing "storming of the Bastille," an altercation between the parties erupted with the Appellants eventually ending up being charged, convicted and now stand before this Honorable Court.

Did these Appellants have the defense that if the jury, looking at the facts through the eyes of the Gougers, reasonably believed that the Gouger's did not believe that the Federal Marshals were engaged in the performance of their official duties, then they should have acquitted the Gouger's of assault? Was this plain error? It is respectfully submitted that the answers to both of these questions should be answered in the affirmative.

Here, what Circuit Judge Wisdom said in *United States v. Young*, 464 F.2d 161 (5th Cir. 1972), is most appropriate:

> Our prior decisions hold that knowledge of the official capacity of the person assaulted is unnecessary for conviction under 18 U.S.C. § 111. *Burke v. United States*, 1968, 400 F.2d 866; *Pipes v. United States*, 1968, 399 F.2d 471; *Bennett v. United States*, 1960, 285 F.2d 567. But none of those cases holds that a defendant may be held absolutely liable for "assaulting" a government officer when the defendant acts from the mistaken belief that he himself is threatened with an intentional tort by a private citizen. "[A] case based upon Section 111, as construed by this court is not submitted to the jury without a charge that the 'assault' must be an intentional act wilfully done without legal excuse." *Burke*, supra, 400 F.2d at 867.
>
> When there is no doubt of the defendant's unlawful intention, knowledge of the official capacity of the

victim is invariably unnecessary; the assailant takes his victim as he finds him. But if the defendant asserts a lack of intention or wilfulness based upon ignorance of the identity of the victim and ignorance of the victim's official privilege to interfere with the defendant's person or freedom of movement, the jury must be allowed to consider the defendant's evidence tending to show that he was ignorant of the official capacity of the victim. For only then can the jury give fair consideration to whether the "assault" was "an intentional act wilfully done without legal excuse." Burke, supra.

The portion of the instruction quoted first was broad enough to permit the jury to find Young guilty of the offenses charged even if the jury believed Young's testimony that he thought he was being harassed by local rowdies. Instead, the jury should have been clearly instructed that it could not find Young guilty of the offenses charged unless the jury believed that Young intended to threaten or attempt to injure Agent Garvie; and that Young could not intend to threaten or to attempt to injure Agent Garvie if Young acted out of a reasonable belief that Agents Garvie and Stringer were strangers who intended to inflict harm upon Young. Such an instruction would permit the jury to pass upon Young's contention that he had no uniawful intention to commit the offenses charged because he acted to protect himself and his fellow passengers.

The Government, in its supplemental brief, points out that the trial court instructed the jury to convict the defendant only upon finding an "unlawful" attempt to inflict injury, defined an attempt "either contrary to law or without legal justification." This portion of the charge, the Government urges, removes the sting from the portion of the charge which stated "it is completely unimportant whether this defendant did or did not know that these men

were FBI agents . . ." We disagree. At best, the charge was confusing and contradictory, even when read in light of the words now stressed by the Government. At best, one portion of the charge correctly stated the applicable law in general terms, but another portion eliminated the key specific ground on which Young denied the wilfulness of his conduct.

We conclude that the charge, considered as a whole, failed "to define with substantial particularity the factual issues," and failed "clearly to instruct the jurors as to the principles of law . . . to apply in deciding the factual issues involved in the case before them." *United States v. Hill,* 5 Cir. 1969, 417 F.2d 279, 281. The failure to instruct properly on the issue of intention effectively deprived Young of his right "to have presented instructions relating to a theory of defense for which there is any foundation in the evidence." *Perez v. United States,* 5 Cir. 1961, 297 F.2d 12, 14-15. As the Court of Appeals for the District of Columbia Circuit has said:

> We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." (Citations omitted).

Tatum v. United States, 1950, 88 U.S. App. D.C. 386, 190 F.2d 613, 617, quoted with approval in *Staruss v. United States,* 5 Cir. 1967, 376 F.2d 416, 419.

> For plain error in the court's charge to the jury, the judgments of conviction are vacated. (163-164).

Here, the Federal Marshals, Kalmbach in particular, told Mrs. Gouger that, contrary to Rule 4 of the Federal Rules of Criminal Procedure, it was not necessary for her to show Mrs. Gouger the writ of attachment and that she could see it when they got to the Federal building.

Here, the Writ of Attachment was for the Appellant, Mrs. Gouger, to be arrested "for not obeying the Order of this Court of January 5, 1977." However, in the interim between the appearance in Court by Mrs. Gouger, which apparently occurred "previous" to January 5, 1977, and January 3, 1978, the Appellants had received a letter from the Internal Revenue Service giving them a "clean bill of health," thus leaving them to believe that they "owed" neither the United States Government nor Judge Singleton any thing; especially, the body of Mrs. Gouger.

Here, at a minimum, these Appellants should have been given a charge that if the Gougers did not reasonably believe, or if they had a reasonable doubt that Kalmbach and Brite were engaged in the performance of their official duties, then the jury should have found the Appellants not guilty. The Appellant's Federal due process rights were violated by the trial court judge failing to so charge and, also, by failing to place the burden of proof upon the Government to negate. See *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); and *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This "ailing instruction, by itself, so infected the entire trial that the resulting convictions violated due process." See *Berrier v. Egeler,* 23 Cr.L.Rep. 2517 (6th Circuit, August 8, 1978). "The error here went to the central issue of guilt or innocence and infected the fairness of the trial itself."

Or, to put it another way. Here, the jury should have been instructed on mistake of fact; i.e., that, under the circumstances, the Appellants reasonably believed the facts to be other than they were and that their actions would have been innocent had their belief been correct. See *United States v. Goodwin,* 440 F.2d 1152 (Third Circuit, 1971).

For these reasons, if no other, new trials should be granted these Appellants.

CONCLUSION AND PRAYER

For all the reasons stated above, the petition for writ of certiorari should be granted and petitioners' convictions and sentences set aside.

Petitioners pray for such relief.

Respectfully submitted,

MARVIN O. TEAGUE
Counsel for Petitioners,
Myra Emily Stein Gouger and
Donald Thomas Gouger
1101 Commerce Building
914 Main Street
Houston, Texas 77002
(713) 222-1728

CERTIFICATE

I certify that three copies of the foregoing petition for writ of certiorari was mailed to the Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, on this the ____ day of April, 1979.

MARVIN O. TEAGUE

APPENDIX

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

March 30, 1979

Mr. Marvin O. Teague
Attorney at Law
1101 Commerce Bldg.
914 Main St.
Houston, TX 77002

No. 78-5523—U. S. A. v. MYRA EMILY STEIN GOUGER and DONALD THOMAS GOUGER

MANDATE STAYED TO AND INCLUDING 4/20/79

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, if any, judgment, or Rule 21 decision, and the denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ BRENDA HAUCK
Deputy Clerk

enc.

cc: Mr. James R. Gough

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5523

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MYRA EMILY STEIN GOUGER,and
DONALD THOMAS GOUGER,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

---

(FEBRUARY 20, 1979)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

ISSUED AS MANDATE

---

* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

March 21, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5523—UNITED STATES OF AMERICA v. MYRA EMILY STEIN GOUGER, and DONALD THOMAS GOUGER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Marvin O. Teague
Mr. James R. Gough

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5523

(Filed and Received March 30, 1979)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MYRA EMILY STEIN GOUGER and
DONALD THOMAS GOUGER,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

---

ORDER:

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(√) The motion of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including APRIL 20, 1979, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the

Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ ROBERT S. VANCE
United States Circuit Judge

Supreme Court, U. S.
FILED
JUN 14 1979
MICHAEL RODAK, JR., CLERK

No. 78-1606

In the Supreme Court of the United States

OCTOBER TERM, 1978

MYRA EMILY STEIN GOUGER AND DONALD THOMAS GOUGER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ALAN J. SOBOL
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1606

MYRA EMILY STEIN GOUGER AND DONALD THOMAS GOUGER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 41) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1979. A petition for rehearing was denied on March 21, 1979. The petition for a writ of certiorari was filed on April 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements by the prosecutor during closing argument constituted an improper comment on petitioners' election not to testify at trial.

2. Whether the district court properly instructed the jury on the elements of the offense.

STATEMENT

After a joint jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of assaulting a Deputy United States Marshal, in violation of 18 U.S.C. 111. Petitioners were each sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 41).

On February 10, 1977, the district court issued a warrant for the arrest of petitioner Myra Gouger after she failed to appear before an officer of the Internal Revenue Service as previously ordered by the court (Pet. 6-8; 1 Tr. 13, 107-103; 3 Tr. 48).[1]

On February 14, 1977, two Deputy United States Marshals contacted petitioner Donald Gouger by telephone and informed him that there was a warrant outstanding against his wife. Mr. Gouger told them that his wife was out to town and that "if you can find her, you can have her" (3 Tr. 51-53). Mrs. Gouger was not located after that telephone call.

On January 3, 1978, Deputy United States Marshal Linda Kalmbach telephoned petitioners' residence, in a further attempt to execute the warrant. Knowing that petitioners sold dinnerware, Kalmbach made an appointment with Mr. Gouger to discuss a purchase later that day (3 Tr. 57-61). Four Deputy United States Marshals,

[1]Mrs. Gouger had previously failed to appear before the district court on at least seven separate occasions pursuant to an Internal Revenue Service summons (1 Tr. 107-109).

together with several local law enforcement officials, then went to petitioners' home to arrest Mrs. Gouger (3 Tr. 51-56, 99, 126-128).

On their arrival, Kalmbach and another female marshal, neither in uniform, approached the residence and rang the doorbell. Mr. Gouger answered the door and invited them into the kitchen (3 Tr. 57, 62-64, 99-101, 128-129). Shortly thereafter, Mrs. Gouger entered the kitchen. Kalmbach identified herself as a Deputy United States Marshal and informed Mrs. Gouger that she was under arrest (3 Tr. 64-65, 101-102). Both petitioners ordered the two marshals out of the house (3 Tr. 65-66, 79). Mr. Gouger then produced a letter that allegedly proved that the civil tax matter that had led to the issuance of the arrest warrant had been resolved. When Kalmbach persisted in the arrest, Mrs. Gouger resisted by striking and kicking her (3 Tr. 67-69, 103-104). At the same time, Mr. Gouger attacked one of the marshals who came to Kalmbach's assistance. Both petitioners were ultimately subdued and arrested (3 Tr. 69-72, 105-114, 131-136).

ARGUMENT

1. Petitioners argue (Pet. 9-14) that the prosecutor's comments to the jury violated their privilege against compelled self-incrimination. The prosecutor made the following statement in response to defense counsel's summation (3 Tr. 232):

> I think one of the most notable things about Mr. Martin's argument is his complete failure to tell us why the Gougers did not, like reasonable, honest citizens should do, respond to that phone call a year before.

* * * * *

> I am talking about Mr. Martin's argument. There was nothing about why the Gougers did not come in like reasonable, honest citizens should have done when they were called about a year earlier and told there was a [sic] arrest warrant out for Mrs. Gouger and please come down to the Federal Building and resolve it. Nothing.

Petitioners contend that the jury could have inferred from these comments that petitioners were under a duty to explain why Mrs. Gouger did not voluntarily surrender when Mr. Gouger received the telephone call advising him that a warrant had been issued for his wife's arrest.

Although a prosecutor may not comment upon a defendant's exercise of his privilege against self-incrimination (*Griffin* v. *California*, 380 U.S. 609 (1965)), the privilege is violated only if the prosecutor's remark would naturally and necessarily be viewed by the jury as a comment on the defendant's failure to testify at trial. *United States* v. *Austin*, 585 F. 2d 1271, 1279 (5th Cir. 1978); *Lussier* v. *Gunter*, 552 F. 2d 385, 388-389 (1st Cir.), cert. denied, 434 U.S. 854 (1977); *United States* v. *Bishop*, 534 F. 2d 214, 220 (10th Cir. 1976); *United States* v. *Williams*, 503 F. 2d 480, 484-485 (8th Cir. 1974). There was no danger that the jury would draw an improper inference in this case.

In his closing argument, petitioners' counsel contended that his clients were law-abiding citizens who had intended only to defend themselves against what they reasonably thought to be unlawful interference with their liberty (3 Tr. 217-218, 220, 225, 228). In answer to this

argument, the prosecutor pointed to the undisputed fact that Mr. Gouger had been advised earlier by telephone that a warrant was outstanding against his wife and that he had taken no action in response to that call. The prosecutor did not refer to petitioners' failure to testify at trial. Rather, his remarks suggested only that inferences could properly be drawn from petitioners' actions and failures to act prior to trial. See *United States* v. *Austin*, *supra*, 585 F. 2d at 1279-1280; *United States* v. *Millet*, 559 F. 2d 253, 258 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Warren*, 550 F. 2d 219, 227-228 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); *United States* v. *Fulton*, 549 F. 2d 1325, 1327-1328 (9th Cir. 1977).[2]

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[2] In *Lockett* v. *Ohio*, 438 U.S. 586, 594-595 (1978), this Court held that, in the circumstances of that case, a reference to the fact that the government's evidence is "uncontradicted" did not constitute an infringement of the privilege against compulsory self-incrimination, since the comments "add[ed] nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand." The challenged remarks in this case were less objectionable than those in *Lockett*.

Even assuming that the comments here were improper, the error was harmless. The trial judge instructed the jury that the law did not compel petitioners to testify and that the jury was not to draw an adverse inference because they did not do so (3 Tr. 248). This was sufficient to cure any prejudice that could have resulted from the prosecutor's remarks. See *Lakeside* v. *Oregon*, 435 U.S. 333, 339 (1978); *Lussier* v. *Gunter*, *supra*, 552 F. 2d at 389; *United States* v. *Warren*, *supra*, 550 F. 2d at 227-228; *United States* v. *Fulton*, *supra*, 549 F. 2d at 1328.

2. Petitioners contend (Pet. 15-37) that the district court improperly instructed the jury on the elements of 18 U.S.C. 111. Specifically, they argue that the court should have instructed the jury that if petitioners "either believed or had a reasonable doubt that the [marshals] were not engaged in the performance of their official duties" they should be acquitted of the offense charged (Pet. 15). However, petitioners neither requested such an instruction nor objected to the court's failure to give it. They are therefore precluded from assigning the omission as error. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977); *United States* v. *Jackson*, 569 F. 2d 1003, 1010 (7th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Jansen*, 475 F. 2d 312, 318 (7th Cir.), cert. denied, 414 U.S. 826 (1973).[3] But even if the instruction had been requested, petitioners were not entitled to it, for their receipt of a letter from the Internal Revenue Service indicating that the underlying tax action had been resolved gave them no right forcibly to resist the execution of the arrest warrant.

The purpose of the federal assault statute is to protect the safety of law enforcement officers, not simply to aid the federal law enforcement effort. See *United States* v. *Feola*, 420 U.S. 671, 684 (1974). Accordingly, a person has no right to resist the execution of a warrant even though the warrant may subsequently be held to have been invalid. *United States* v. *Martinez*, 465 F. 2d 79, 82 (2d Cir. 1972); *United States* v. *Ferrone*, 438 F. 2d 381,

[3]The court correctly charged the jury that knowledge of the identity or official character of the person assaulted is not an essential element of the offense but that in order to convict petitioners it had to find that they willfully assaulted or impeded the marshals while the marshals were engaged in the performance of their official duties (3 Tr. 251-253).

389-390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971). The rationale for this doctrine was explained in *Ferrone* (438 F. 2d at 390):

> A public officer supported by written process has a right to expect that citizens will respond peaceably, that neither his life nor those of other parties will be endangered, and that any dispute will be resolved through legal means.

In this case, it is undisputed that petitioners knew that the persons they assaulted were Deputy United States Marshals and that the marshals possessed a warrant to arrest Mrs. Gouger (3 Tr. 51-53, 64-65, 101-102, 107, 131-132, 147). The letter petitioners received from the IRS represented, at most, grounds to challenge the warrant in court, not to assault the deputy marshal who served it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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